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**BEFORE THE ARIZONA CORPORATION COMMISSION**

IN THE MATTER OF THE FORMAL  
COMPLAINT OF CHARLES J. DAINS  
AGAINST RIGBY WATER COMPANY

DOCKET NO. W-01808A-09-0137

**RIGBY WATER COMPANY'S  
EXCEPTIONS TO RECOMMENDED OPINION AND ORDER**

Pursuant to A.A.C. R14-3-110(B), Rigby Water Company respectfully submits the following exceptions to the Recommended Opinion and Order ("ROO") issued on March 1, 2011.

**I. The ROO Should be Amended to Reflect the Evidence of Actual Construction Costs Adduced at the Hearing.**

The ROO's conclusion that the refundable advance made by Complainant Mr. Charles J. Dains ("Mr. Dains Sr.") totaled \$236,988.68 is unfounded and not supported in the record. Construction on the Terra Ranchettes Mobile Estates ("Terra Ranchettes") was completed no later than July 31, 1997. [Trans. 48:23-25 (Mr. Charles D. Dains ("C.D. Dains"))].<sup>1</sup> Mr. C.D. Dains admitted that in May of 1998, ten months after construction of

<sup>1</sup> The pre-filed direct testimony of witnesses is referred to as "Pre-Filed Direct Testimony of \_\_\_\_," with following references to the page and line numbers of that pre-filed testimony. Testimony taken at the hearing shall be referred to as "Trans.," with following references to the page and line numbers of the referenced transcript. Hearing Exhibits shall be referred to as "Ex. \_\_\_\_." Rigby's pre-filed exhibits, RWC 1 through RWC 14 were

1 the system in question was complete, Mr. Dains Sr. sent an itemization of actual  
2 construction costs to Rigby Water Company totaling 207,388.67. [Ex. RWC 13.] That  
3 itemization closely approximated the \$204,414.34 in construction costs detailed by  
4 Complainant's construction lender sometime near the end of construction. [Ex. RWC 14.]  
5 Complainant did not provide any evidence that it actually advanced or paid \$236,988.68 for  
6 the construction of the Terra Ranchettes water infrastructure. That figure is based entirely  
7 on a summary of estimated construction costs that required substantiation by Mr. Dains Sr,  
8 which was never provided. [Trans. 49:6-50:21 (C.D. Dains admitting that he had no checks  
9 showing any payments made and no invoices for any of the alleged construction costs);  
10 Trans. 75:16-23 (admitting that Complainant had not even attempted to obtain copies of  
11 invoices substantiating costs).] It also includes \$16,000 for purchase of the Tobin easement,  
12 an amount that was not a refundable advance under the parties agreement. [Ex. RWC 5,  
13 § 13 (developer "shall, at no cost to Utility, grant or cause to be granted to Utility, perpetual-  
14 rights-of-way and easements...").]

15 A.A.C. R14-2-406(D) provides that "[t]he aggregate refunds under this rule shall in  
16 no event exceed the total of the refundable advances in aid of construction." Subsection M  
17 of Rule 406 further provides that in instances where the mainline extension agreement is not  
18 approved by the Arizona Corporation Commission, "the refundable advance shall be  
19 immediately due and payable to the person making the advance." A.A.C. R14-2-406(M)  
20 (emphasis supplied). Under Commission rules, Rigby Water Company cannot be required  
21 to refund any amounts beyond the refundable advance actually provided by the developer.  
22 The ROO sets that amount approximately \$46,000 too high. If Rigby Water Company is  
23 ordered to repay Complainant, the amount to be repaid should be limited to \$164,127.24, an  
24 amount equal to Complainant's own post-construction itemization of actual construction  
25 costs of \$207,388.67, less the \$27,261.43 already refunded by Rigby Water Company to  
26

27 admitted as part of hearing exhibit R-1, and are referred to by their RWC designation for  
28 clarity.

1 Complainant and the non-refundable \$16,000 allegedly expended by Mr. Dains Sr. to  
2 purchase the Tobin easement.

3 **II. The ROO Should be Amended Because it Erroneously Shifts the Burden of**  
4 **Obtaining Construction Approvals From the Developer to the Utility.**

5 The ROO erroneously concludes that Rigby Water Company should have  
6 independently obtained a copy of the Approval to Construct ("ATC") required for  
7 Commission approval of the mainline extension agreement from Maricopa County. In so  
8 doing, the ROO inappropriately shifts the burden of obtaining the ATC to Rigby Water  
9 Company. Mr. Dains Sr. was the developer of the Terra Ranchettes subdivision, including  
10 the water infrastructure. He was responsible under Arizona law, as well as the parties'  
11 agreements and recognized industry practice, to obtain all necessary permits and approvals.  
12 [See Ex. RWC 16 (March 19, 1985 letter from Rigby Water Company copied to Mr. Dains  
13 Sr. indicating that the developer was responsible for obtaining all necessary governmental  
14 approvals).]

15 Rather than recognize Complainant's contractual and legal obligations (or the  
16 negative impact abrogating those obligations will have on development practice), the ROO  
17 places the entire burden for compliance with all legal obligations, including those owed by  
18 the developer, on the utility. Under the reasoning of the ROO, utilities must now act as  
19 construction managers for developers within their Certificates of Convenience and  
20 Necessity. If a developer fails to meet any of its construction obligations related to water  
21 infrastructure, including those obligations imposed by other agencies' regulations, the utility  
22 must take affirmative steps to comply for the developer or to obtain information the  
23 developer should have provided, without any compensation and without any discernable  
24 limitation. Such a result is inappropriate, unsupportable and constitutes poor public policy.

25 In addition, the ROO's conclusion that Rigby Water Company could have obtained a  
26 copy of the ATC at issue to satisfy Commission filing requirements lacks evidentiary  
27 support. The ATC provided as a late-filed exhibit by Complainant was issued by Maricopa  
28 County in 1985, eleven years prior to the start of construction. [Ex. Dains 12.] By its own

1 terms, it expired one year after issuance unless construction had begun. [Id.] The only  
2 evidence of the continued validity of that ATC was an intra-agency memorandum dated  
3 May 2, 1996 indicating that the original ATC had been extended. [Dains 13.] Under the  
4 ROO's reasoning, Rigby Water Company was required to track down a memorandum from  
5 the Engineering Division of the Maricopa County Environmental Services Department to  
6 the Arizona State Real Estate Department to obtain confirmation that an ATC had been  
7 issued for the Terra Ranchettes project. Even if that were reasonable, which it is not as  
8 evidenced by Complainant's own failure to track down that memorandum until after the  
9 hearing in this matter, it is questionable that the intra-agency memorandum would meet  
10 Commission filing requirements, which require submission of an ATC. [See Ex. S-2 (Staff  
11 checklist).] Accordingly, the ROO should be amended to recognize that shifting the parties'  
12 allocation of responsibilities to the utility is unsupported and inappropriate.

13 **III. The ROO Should be Revised to Address the Legal Effects of Complainant's**  
14 **Own Actions.**

15 The ROO summarily dismisses the effects Complainant's own actions had with  
16 respect to the Commission's review and approval of the mainline extension agreement in  
17 question. [ROO, ¶ 104.] In doing so, the ROO ignores relevant Arizona law. Arizona law  
18 clearly precludes a party to a contract, who has frustrated another party's performance under  
19 that contract, from profiting from the failure of that condition. Williams v. Nall, 4 Ariz.  
20 App. 416, 420, 420 P.2d 988, 992 (1966) ("one who prevents performance of a contract may  
21 not complain of such nonperformance"); Johnson Int'l, Inc. v. City of Phoenix, 192 Ariz.  
22 466, 471, 967 P.2d 607, 612 (App. 1998) ("A party to a contract cannot prevent the  
23 fulfillment of a condition precedent [or subsequent] and later rely on the failure of the  
24 condition to argue that no contract exists"); see also Holmes v. Graves, 83 Ariz. 174, 177-  
25 178, 318 P.2d 354, 356-57 to (1957) ("[s]tatutory provisions enacted for the benefit of  
26 individuals may be so far waived by those for whose benefit they were enacted that they are  
27 estopped to insist upon their protection"); 17A Am. Jur. 2d Contracts § 666 (2004)  
28 ("Impossibility that arises directly or even indirectly from the acts of the promisee [here,

1 Complainant] is considered a sufficient excuse for the other party not performing, since one  
2 who prevents performance may not take advantage of the situation”).

3 The ROO permits Mr. Dains Sr. (and his estate) to profit from his own misdeeds,  
4 when he should be precluded, as a matter of law, from benefiting from his own bad faith  
5 actions. Mr. Dains Sr. frustrated and prevented Rigby Water Company from obtaining  
6 Commission approval of the mainline extension agreement by refusing to supply the  
7 information required to obtain such approval, which he, as the developer, had the sole  
8 obligation to obtain and provide. [See, e.g., Pre-Filed Direct Testimony of F. Wilkinson at  
9 6:15-24 (Mr. Wilkinson had to “hound Mr. Dains for nearly four years to even get the  
10 mainline extension agreement signed”); Pre-Filed Direct Testimony of F. Wilkinson at  
11 13:22-14:2; see also Trans. 55:25-56:11 (Mr. Dains Jr. admitting that he has no  
12 documentation indicating the ATC was ever provided to Rigby Water Company).] Mr. C.D.  
13 Dains now seeks to take advantage of his and his father’s own bad faith actions to extract  
14 additional payments from Rigby Water Company. Such bad faith should not be rewarded.  
15 Requiring Rigby Water Company to immediately pay Mr. Dains Sr.’s estate an amount  
16 equal to the funds Mr. Dains Sr. allegedly expended in installing the Terra Ranchettes  
17 infrastructure, after he frustrated compliance with the Commission’s rules, would be grossly  
18 inequitable and inconsistent with the public interest.

19 **IV. The ROO Disproportionately Penalizes Rigby Water Company For Conduct for**  
20 **Which Complainant Was Equally Culpable.**

21 The ROO requires Rigby Water Company to refund \$209,727.25 to Complainant for  
22 an essentially ministerial error actually attributable to Complainant’s own actions. As noted  
23 above, Mr. Dains Sr. failed to abide by his obligations under the mainline extension  
24 agreement. He then waited approximately ten years from the time that agreement was  
25 executed (and twelve years after Rigby Water Company began providing water service to  
26 Terra Ranchettes) to file a formal Complaint. During that time, Mr. Dains Sr. accepted the  
27 benefits of the agreement. [Pre-Filed Direct Testimony of F. Wilkinson at 9:13-13:2; Exhs.  
28 RWC 9, 10.] Moreover, Mr. C.D. Dains admitted that he and his father accounted for the

1 cost of the water infrastructure in the cost of the lots themselves. [See Trans. 31:25-34:10  
2 (Mr. C.D. Dains admitting that sale of lots in development recouped, at a minimum, \$1.6  
3 million); Trans. 60:19-61:15 (lot prices were set before parties entered into Agreement and  
4 Mr. C.D. Dains anticipated making profit on lots).] Only when Mr. Dains Sr. (or his son)  
5 perceived that there was the opportunity to obtain a substantial windfall from Rigby Water  
6 Company did he file a formal Complaint. [See Trans. 66:24-67:15.] The ROO rewards that  
7 behavior by requiring Rigby Water Company to refund over \$200,000 to Mr. Dains Sr. for  
8 failure to comply with a ministerial checklist.

9 As Staff's sole witness testified, mainline extension agreements are reviewed for  
10 compliance with a checklist of Commission requirements. [Trans. 187:3-9; Ex. S-2  
11 (checklist used by Staff).] If the agreement meets those requirements and the costs are  
12 approved by the Engineering Division, the agreement is approved. [Trans. 190:16-191:9.]  
13 As Mr. Wilkinson testified, Rigby Water Company's standard form of mainline extension  
14 agreement has been filed with and approved by the Commission on several other occasions  
15 without issue. [Pre-Filed Direct Testimony of F. Wilkinson at 14:9-15; Trans. 147:20-  
16 148:12 (agreement has been approved seven other times); 169:3-14 (same).] Staff  
17 confirmed that the mainline extension agreement at issue would have been approved had it  
18 been submitted with the supporting documentation withheld by Complainant. [Trans.  
19 191:20-192:5.] Despite the ministerial nature of Rigby Water Company's alleged infraction  
20 (and Complainant's equal culpability), the ROO rewards Complainant with a double  
21 recovery. Such a result is unwarranted based on the record.

22 **V. The Compliance Deadline Set in the ROO Should Be Extended.**

23 The ROO directs Rigby Water Company to refund \$209,727.25 to Complainant  
24 within thirty days of the effective date of a Commission Decision in this matter. In the  
25 event the Commission decides in favor of Complainant, and given the state of the economy,  
26 the fact that Mr. Dains Sr. never made any actual cash advance to Rigby Water Company,  
27 and the financial status of Rigby Water Company as demonstrated in its annual reports on  
28 file with the Commission, this compliance deadline should be extended until at least thirty

1 days after entry of Final Judgment in the City of Avondale's pending condemnation suit  
2 against Rigby Water Company, Maricopa County Superior Court Case No. CV2009-  
3 003060.

4  
5 RESPECTFULLY SUBMITTED this 10th day of March, 2011.

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7  
8  
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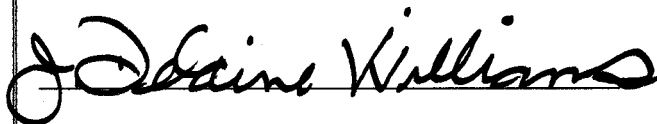
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